

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
MICHAEL CHARLES SCHICKE,)	Case No. 96-10945
)	
Debtor.)	Chapter 7
_____)	

ORDER DENYING DEBTOR’S MOTION FOR SUMMARY JUDGMENT

Michael Charles Schicke, debtor, moves for summary judgment denying Chanute Production Credit Association’s (“PCA”) Motion to Reopen Bankruptcy. At issue here is whether PCA received appropriate notice of Shicke’s bankruptcy. PCA was listed in Schicke’s schedules as an unsecured creditor with PCA’s address shown as the last known mailing address of a lawyer in Chanute, rather than the PCA’s actual address.

The Court has jurisdiction over the Motion to Reopen as a contested matter. 28 U.S.C. § 1334. Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to contested matters by Rule 9014 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056, 9014. “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue of material fact.”¹ In determining whether any genuine issues of material fact exist,

¹Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

the Court must construe the record liberally in favor of the party opposing the summary judgment.²

However, the opposing party's conclusive allegations are not sufficient to establish an issue of fact and defeat the motion.³

The parties in this action have a long history of state court litigation, both pre- and post-judgment. In 1984, Schicke was found to have defrauded PCA of some \$581,186.39 in Montgomery County, Kansas, District Court, case no. 81 C 97I. In 1991, PCA filed a Praecipe For Execution to satisfy the 1984 judgment. A further Request For Execution was filed in October, 1991. The record is silent as to the specific facts, but it appears PCA filed no further post-judgment proceedings except as set out below. Schicke filed his Chapter 7 petition on March 27, 1996. Thereafter, PCA continued to execute, garnish and seek hearings in aid of execution notwithstanding the automatic stay. PCA claims it did so because it never received notice of Schicke's bankruptcy petition. PCA asserts that lawyer William D. Coombs, at whose address PCA was listed in debtor's schedules, never informed PCA of the pendency of the case.

In September of 1996, R. Kent Pringle, another Chanute lawyer, entered his appearance in the state court case for PCA and commenced more post-judgment proceedings. Sometime in January of 1997, Pringle obtained a copy of Schicke's discharge. According to PCA, this was its first notice of the bankruptcy. Pringle inquired of Schicke's present counsel concerning the manner in which PCA had been listed as a creditor and at what address. Debtor's counsel responded that he had given notice to Coombs and believed the notice to PCA of Schicke's bankruptcy to be sufficient. Schicke's counsel also asserted that PCA's debt had been discharged. Nevertheless,

²McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

³Id.

Pringle obtained an order requiring Schicke to appear at a hearing in aid of execution. Schicke failed to appear, instead having his present counsel send a letter to the state court explaining that he had been discharged in bankruptcy and that the debt to PCA had been discharged. The trial court was not informed of the letter and issued an order to show cause why Schicke should not be held in contempt for failure to appear. Schicke responded by filing a motion for sanctions against PCA for violating the bankruptcy court order of discharge. Thereafter, PCA filed its own motion for sanctions against Schicke arguing its debt had not been discharged. Because PCA did not advise the court of the bankruptcy filing (of which it apparently knew at that time), the district court sanctioned PCA under K.S.A. §60-211. The district court also declined to exercise what it deemed concurrent jurisdiction with the Bankruptcy Court to determine whether Schicke's debt had been discharged or was dischargeable under 11 U.S.C. §523.⁴ On appeal, the Kansas Court of Appeals reversed the sanctions award but affirmed the district court's deference to this Court on the discharge issue. Chanute Production Credit Assoc. v. Schicke, 27 Kan. App. 2d 769, 9 P.3d 561 (2000).

Thereafter, PCA filed the instant motion to reopen the case under §350 to pursue a dischargeability proceeding here and Schicke filed his motion for summary judgment. Schicke attaches as exhibits documentation indicating that Coombs had at one time represented PCA and that his address during the pertinent time period had been Box 306 in Chanute. Because Coombs had at one time represented the PCA, debtor believed that service on counsel was sufficient notice of commencement of the bankruptcy case and listed counsel's address instead of the PCA's address. In its response, PCA offered a copy of a letter from the Kansas Supreme Court indicating

⁴All statutory references are to the Bankruptcy Code, Title 11 U.S.C. unless otherwise noted.

that Coombs' address of record with the Court had been Box 306 in 1995, but Box 725 in 1996 and 1997. While these proffers are informative, they are not dispositive of the issue of whether PCA was properly given notice of Schicke's bankruptcy case.

Because this is a motion for summary judgment, the Court must take the facts presented and interpret them in the non-moving party's (PCA's) best light. In so doing, the Court must focus on two questions: (1) did Schicke comply with the applicable rules when he scheduled PCA with Mr. Coombs' address rather than PCA's actual address; and (2) did PCA receive notice of Schicke's bankruptcy in time to protect its interests in 1996? There is no dispute about the manner in which PCA was scheduled. On this record, however, the Court has no way to determine, without employing considerable speculation or supposition, whether PCA had actual notice or knowledge of Schicke's bankruptcy case.

Procedurally, PCA's motion to reopen is in the nature of a motion for relief from judgment under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b). Rule 9024(1) provides that Rule 60(b)'s one-year time limitation does not apply to motions to reopen cases. As such, PCA's motion is timely.

The Court is convinced that Schicke failed to follow the procedure for scheduling creditors. This is one occasion where failure to mind the "fundamentals" in bankruptcy can be fatal. Section 521(1) provides that a debtor shall file with his petition a list of creditors or schedules of assets and liabilities. The purpose of this is obvious: so that creditors may receive notice of the pendency of the case and the imposition of the stay, and the trustee may adequately investigate the debtor's affairs. Fed. R. Bankr. P. 1007(a)(1) provides, "[i]n a voluntary case, the debtor shall file with the petition a list containing the *name and address of each creditor* unless the petition is accompanied by a schedule of liabilities." (Emphasis added.) Additionally, Fed. R.

Bankr. P. 1007(b)(1) requires that any such schedules be “prepared as prescribed by the appropriate Official Forms.” This Court’s Local Rules are more specific. “Creditors shall be listed alphabetically *with the full address of each*, including post office box or street number, city or town, state and zip code. *If it is known that the account or debt has been assigned or is in the hands of an attorney ..., the full name and address of such ...agent shall be set forth....*”

L.B.R.1007(b).1 (Emphasis added.)

These Rules require that creditors’ addresses as listed in the schedules be their *actual* addresses. In promulgating the Local Rules, the judges of this Court plainly distinguished between those addresses and the addresses of creditors’ attorneys. Equally plain are the instructions to the Official Forms. Official Form 6 is the prescribed format for Schedules A through J. Schedule F pertains to unsecured creditors. The form itself calls for “Creditor’s Name and Mailing Address.” The instructions promulgated with the Forms provide, in part:

It is crucial for the debtor to list all remaining creditors on this form, because the debtor may be unable to receive a discharge of debt of the creditor *was not properly scheduled and had no notice of the bankruptcy.*

The most important aspect of this form is the listing of the creditors and *their complete addresses*, including zip codes.⁵

The format of Official Form 6 is little changed from 1996, nor does it appear that either Fed. R. Bankr. P. 1007 or L.B.R. 1007(b).1 have changed materially since that time. Accordingly, at the time this case was filed, proper designation of PCA as a creditor required that *its* mailing address, not its lawyer’s mailing address, be included in the schedules.

Failure to give a creditor notice of a bankruptcy filing raises critical due process concerns.

⁵Official Form 6, Instructions for Completing Schedule F, ¶¶ 3 and 5, West, 2001.

Under the Bankruptcy Code and Rules, PCA was not sufficiently scheduled and, therefore, was potentially deprived of due process. After all, the physical location of the PCA by a debtor who lived in Chanute, and was represented by a lawyer in Coffeyville, which is within 100 miles of Chanute, Kansas, should not have been difficult to determine. At a minimum, Schicke could have made inquiry to determine who PCA's registered agent was. In any event, Schicke's excuse that PCA was "not in the phone book" seems insufficient.

The Court concludes that Schicke's scheduling of PCA's address as that of its attorney is technically deficient. As discussed above, PCA should have been listed in Schicke's schedules and noticed of his bankruptcy at its actual address. This is, however, a question discrete from that of whether PCA received notice of this filing. The Court cannot determine from the record on this motion whether PCA ever received actual notice of this bankruptcy case in time to protect its rights. Therefore, the Court cannot find that there are no remaining issues of fact or that Schicke is entitled to judgment as a matter of law that PCA did receive such notice. Determining this question will require not only further evidence of what PCA did and did not know (or was and was not told) but also an analysis of notice and due process requirements and the law pertaining to unnoticed creditors and discharges under § 523(a)(3).

Since neither Chanute nor Coffeyville, Kansas are big towns , the Court has some question about whether it is possible that no one at PCA ever knew of or heard about Schicke's bankruptcy filing. Equally perplexing, however, is Schicke's failure to take every measure to give notice of his case to his largest and doubtlessly most troublesome creditor. Presumably counsel and the parties will enlighten the Court on these and other salient points at a later hearing.

THEREFORE, IT IS ORDERED that Debtor's Motion for Summary Judgment is DENIED. The Clerk's Office is directed to set for PCA's Motion to Reopen for evidentiary hearing at its

earliest convenience.

Dated at Wichita, Kansas this 29th day of January, 2001.

ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **ORDER DENYING DEBTOR'S MOTION FOR SUMMARY JUDGMENT** were deposited in the United States mail, postage prepaid on this 29th day of January, 2001, to the following:

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